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Supreme Court, U. S.
FILED
SEP 14 1979
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

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**No. 78-1903**

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FREDERIC B. INGRAM, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## PETITIONER'S REPLY MEMORANDUM

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1. The evidence which reportedly persuaded a majority of the jury members to change their verdict regarding petitioner from "not guilty" to "guilty" (see our Petition, p. 6, n.3) was testimony concerning a transaction in Brazil which the prosecutor characterized as proof that petitioner had paid "bribes" in that country (Tr. 6141). The government does not defend the prosecutor's inflammatory characterization. Instead, it describes the challenged evidence as "testimony concerning some earlier questionable business

activity" (Br. in Opp., p. 3) and argues that such evidence was admissible under Rule 404(b) of the Federal Rules of Evidence to establish petitioner's criminal intent. In fact, there was not a shred of evidence suggesting that this "questionable business activity" was improper or illegal in Brazil or, indeed, even "questionable" in that jurisdiction. For this reason, the Brazilian transaction could not have constituted any evidence that petitioner harbored any criminal intent whatever when he authorized payments in connection with the Ingram Corporation's contract with the Chicago Metropolitan Sanitary District. Thus, while this line of proof was devastatingly prejudicial with the jury, it was not at all probative on the central issue of criminal intent and should not, therefore, have been admitted.

2. The government totally misconstrues our contention that the decision below conflicts with *United States* v. *Beechum*, 582 F.2d 898 (5th Cir. 1978), *cert. denied*, 99 S. Ct. 1244 (1979), which required decision by an *en banc* session of the Fifth Circuit. The government erroneously asserts that *Beechum* required "only that extrinsic evidence relate to an intent similar to the intent of the charged offense," and it wrongly states that *Beechum* "rejected the suggestion that a 'high degree of similarity' was required" (Br. in Opp., pp. 5-6). In fact, the majority in *Beechum* held unequivocally that proof may not be admitted under Rule 404 (b) unless "the extrinsic offense requires *the same intent* as the charged offense." 582 F.2d at 913 (emphasis added). The *Beechum* majority was of the view that when, as was true here, the intent needed to commit the two acts is totally dissimilar, the "extrinsic offense" may not be used to prove criminal intent with respect



to the "charged offense." This point was underscored by the *Beechum* majority when it cautioned that "relevancy is established once *the identity of the significant state of mind* is established." 582 F.2d at 916 (emphasis added). And the dissenters in *Beechum* emphasized this element of the majority's standard by calling attention to, and quoting, the passages of the majority opinion which defined "the requirement that the intent of the extrinsic crime be the 'same' as the intent of the charged crime." 582 F.2d at 923-924.[1] The *Beechum* majority adopted a "more lenient standard" only with respect to the "physical elements of the extrinsic offense" and with regard to the quantum of proof needed to establish commission of the extrinsic offense. 582 F.2d at 910. It did not accept a "more lenient standard" on the question whether there had to be an identity of criminal intent to warrant introduction of the proof of the "extrinsic" act.[2]

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[1] The *Beechum* identity-of-interest test was recently reaffirmed and reapplied by the Fifth Circuit in *United States* v. *McMahon*, 592 F.2d 871 (5th Cir. 1979).

[2] The government also misconstrues our argument when it asserts that the Brazilian transaction was admissible even if it did not constitute a crime in Brazil because Rule 404(b) "also includes non-criminal 'acts'" (Br. in Opp., p. 4). As noted in *United States* v. *Senak*, 527 F.2d 129, 143 (7th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976), on which the government relies, the critical question was whether the extrinsic acts are *relevant* to any element of the charged offense. Some acts, such as those in *Senak*, are relevant to prove the defendant's plan and intent even if they are not criminal. But the Brazilian transaction involved in this case was totally irrelevant if the payments made in that country were neither illegal nor improper. Hence we are not contending that the non-criminal character of the Brazilian transaction rendered it, *ipso facto*, inadmissible. We maintain, rather, that for the purposes the prosecution sought to use the evidence in this case, the absence of proof of criminality or impropriety rendered the evidence irrelevant.

3. The importance of the issue of admissibility of such proof under Rule 404(b) of the Federal Rules of Evidence is demonstrated by the very recent observation of a leading authority on the law of evidence that "any habitual reader of the Federal Reporter soon realizes [that] more appellate opinions deal with Rule 404(b) than any other of the Federal Rules of Evidence." Berger, "Federal Evidence: Procedural Devices, New Decisions Can Keep Propensity Evidence Out," *The National Law Journal* (July 16, 1979), p. 22.[3] There is now great confusion among the federal courts as to when "propensity" evidence may be admitted in criminal cases under Rule 404(b). This case presents a significant opportunity to clarify the identity-of-intent requirement as well as to prescribe the function of an appellate court in reviewing a district judge's ruling on such a question. As demonstrated in our Petition, the court of appeals made no evaluation whatever of the prejudice that was caused by the admission of this proof (Petition, pp. 19-20), and simply abdicated to the trial judge's judgment the balance prescribed by Rules 404(b) and 403.

Such total abdication is a far cry from the proper test—which is for the appellate court to determine, on weighing the probable prejudice of the evidence against its probative value, whether the trial judge has abused his discretion. In each of the three cases cited in the government's Brief in Opposition, the appellate court considered, on its substantive merits, whether undue prejudice outweighed the probative value of the proof admitted under Rule 404(b) and concluded that, on the merits of the contention, there had been no abuse

[3] Professor Berger is the co-author of the five-volume work called *Weinstein's Evidence* (1978).



of discretion.[4] The approach taken in all three of those decisions conflicts, therefore, with the Seventh Circuit's ruling in this case that "only the *manner* in which the district court exercised its discretion," and not the merits of that exercise of discretion, was a proper subject of review. And our petition does not, as the government asserts, ask this Court to "reweigh . . . the balance between probative value and prejudicial effect on the particular facts of this case" (Br. in Opp., p. 7). Rather, it asks this Court to make it clear to courts of appeals that *they* cannot avoid the task of

[4] In *United States* v. *Sigal*, 572 F.2d 1320, 1323 (9th Cir. 1978), the Ninth Circuit held that the evidence of a prior conviction on a charge of possessing narcotics with intent to distribute was "highly probative" and not unduly prejudicial in a trial in which the defendant claimed that he was an innocent unknowing bystander to the importation of marijuana from Mexico. In *United States* v. *Czarnecki*, 552 F.2d 698, 702 (6th Cir.), *cert. denied*, 431 U.S. 939 (1977), the Sixth Circuit discussed, in a long paragraph, whether it was "more prejudicial than probative" to show that the defendant had, on prior occasions, hired the individual who had made extortionate threats against the victim of the charged offense. The court concluded that since there had been no implication that the other employment relations were criminal in nature, the prejudice did not outweigh the probative value of the evidence. (In the present case, of course, the prosecutor went out of his way to imply to the jury that the acts in Brazil were "bribes" and were, therefore, criminal.) And in *United States* v. *Nichols*, 534 F.2d 202, 204-205 (9th Cir. 1976), the Ninth Circuit considered, on the merits, the question whether the defendant's possession of stolen checks could be introduced to prove that he knew that credit cards in his possession had been stolen. Only because checks which had been among those stolen had been made out in the name of the owner of the stolen credit cards, and the credit cards had been used to negotiate the checks, was the evidence pertaining to the stolen checks admitted. The court said that the proof had "substantial probative value" because "[e]vidence of the check cashing with identification by stolen credit cards would dispel the notion that defendant was unaware that the credit cards were lost or stolen." 534 F.2d at 205.

"reweighing the balance" (even granting due weight to the trial judge's exercise of discretion) by deliberately limiting their examination only to the "manner" in which the judge's discretion was exercised.

4. Notwithstanding the government's contrary assertion in a footnote (Br. in Opp., p. 7, n.5), the Sixth Circuit squarely held in *United States* v. *Prince*, 529 F.2d 1108 (6th Cir.), *cert. denied*, 429 U.S. 838 (1976), that even after this Court's ruling in *United States* v. *Feola*, 420 U.S. 671 (1975), the prosecution must prove a defendant's knowledge of interstate transportation as an element of a violation of the Travel Act. Nor, despite the government's contrary implication, did the Sixth Circuit limit the requirement of such proof to defendants whose activities were "wholly intrastate." But in any event, in this case as in *Prince*, all the acts allegedly performed by the petitioner were performed within one state (here, Louisiana). The trial judge's instruction that the prosecution need not prove that petitioner "either knew or could foresee that interstate travel would occur" thus conflicted squarely with the ruling of the Sixth Circuit.

5. If, as the government argues, extortion is not a defense to bribery under Illinois law, and Illinois law controls the defenses available under the Travel Act in this case (Br. in Opp., p. 8), the trial judge should have granted no "extortion defense" instruction whatever. In fact, the trial judge granted such an instruction, thereby indicating that he believed that an extortion defense was available. The convoluted nature of the instruction (which is reproduced at pp. 25a-27a of the Petition), and the fact that it substantially shifted the burden of proof to the defendant to prove "legal



entitlement" and duress sufficient to "substantially impair his ability to exercise free choice," rendered the instruction totally erroneous.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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